INSAS BHD & ANOR

v.

RAPHAEL PURA

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL SUIT NO: S2-23-42-1996]
25 OCTOBER 1999

CIVIL PROCEDURE: *Judge - Disqualification - Oral application to disqualify judge for apparent bias - Appropriate test - Whether there should be 'real danger' and not 'real likelihood' of bias - No pre-judgment of facts or issues on part of judge - Whether no basis to suspect that a fair trial would not be possible*

CIVIL PROCEDURE: *Pleadings - Amendment - Statement of defence - Failure to file affidavit in reply - Whether fatal - Application to amend during trial - Whether too late - Whether in breach of rules - Rules of the High Court 1980, O. 20 r. 5*

The plaintiffs had sued the defendant for defamation over an article published in the International Commercial Litigation Magazine ('the present suit'). The facts showed that apart from the present suit, the article had also given rise to others suits, including the so-called 'Tommy Thomas suit' and 'Euromoney Suit', all of which were heard by the learned judge in the present case.

The 'Tommy Thomas Suit' involved a contempt proceeding against lawyer Tommy Thomas, in which the learned judge found the said lawyer guilty of publishing false and malicious statement that the court, despite his objection, had effected a settlement of the contempt suit. In the Euromoney Suit, the first plaintiff herein, Insas Berhad, sued the publishers of the magazine, whilst counsel for the defendant herein held a watching brief for the defendant. It was not in dispute that the learned judge, having embarked on hearing the present suit, had deferred continuing with the Euromoney Suit.

The defendant had intended to call Tommy Thomas as a witness in the present suit. The facts also showed that the learned judge, in recording the terms of settlement in Tommy Thomas Suit, had *inter alia* read a statement saying that there is no basis for the allegation that justice in this country is for purchase ('Statement in Open Court'). This being the case, the defendant applied, albeit orally, to disqualify the learned judge herein from hearing the present suit on grounds that he had a pre-judgment of issues and facts, and was open to bias or possible bias. The defendant also applied: (i) to amend his

statement of defence *vide* encl 31A; (ii) to amend encl 31A and rectify the errors therein *vide* encl 40; and (iii) to amend his defence during the trial of the present suit *vide* encl. 43. The defendant sought to justify the late application of encl. 43 by saying that he could not amend earlier because he had to interview the witness and secrete the documents overseas for safekeeping. The defendant however admitted that what was sought to be amended was not fresh evidence and that they had been raised in an earlier suit.

Held:

[1] It is totally improper at the slightest pretext to seek the disqualification of a judge on the basis that a right thinking member of the public would have cause to entertain a "reasonable suspicion or belief that there was 'a real likelihood' that a fair trial of the present action" before this court was not possible.

[1a] Whilst there is no law to prevent a party from orally requesting the judge to disqualify himself the judge ought to equally give little weight to such an oral application, unsupported by a sworn affidavit.

[2] At no point of time did I ever decide or make a pre-judgment that the words attributed to the defendant were defamatory of the plaintiffs. The defamatory words attributed to the defendant were never in issue in the Euromoney Suit or in the committal proceedings against Tommy Thomas. I also had so far not made any finding that Raphael Pura, the defendant herein, did in fact speak to the writer of the said article, Samuels. This is an issue which I have to determine based on evidence adduced at the trial.

[3] The appropriate test for apparent bias ought to be stated in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. I would take the requirement to prove a real likelihood of bias as a step even stronger than the existence of real danger. Having considered all the circumstances, there is certainly no real danger of bias in this case.

[4] The argument that there was a real likelihood of bias on my part against Tommy Thomas is devoid of merit. Just because Tommy Thomas was found guilty of contempt cannot render his evidence in this case unacceptable. The truth of what he will say in evidence will be tested by cross-examination. Evidence will be given and recorded in open court and the court will decide with an open mind based on the evidence.

Further, the 'Statement in Open Court' is nothing more than a statement of fact that no litigant or counsel can buy justice in this country. Such comment cannot amount to a pre-judgment of issues or facts or showing bias or a real likelihood of bias or a real suspicion of bias.

[4a] As for the Euromoney Suit, it is obvious that no bias or possible bias can be levied against this court because I have not yet given my decision since the plaintiff has not yet even tendered its written submission. I had in the circumstances, and considering the fact that I am now hearing the present case, and in all fairness to the defendant, even deferred continuing with the Euromoney Suit until I hear the present case.

[5] Enclosure 40 is defective as it is unsupported by an affidavit. Once a party elects to take a course of action when two such courses are open to him and if the course taken by him is defective he cannot switch mid-stream and fall back on the other course.

[6] The defendant, by attempting to amend the defence at such a late stage *vide* encl 43, was in breach of the rules that govern his application to amend. The defendant has not shown a basis for the amendment and has totally failed to exhibit any supporting documents. Assuming that the documents were kept overseas as alleged, this court must be shown the documents and they must be identified to satisfy the court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led.

[6a] Assuming that the documents were top secret materials that had to be secreted overseas, then such documents must fall under the Official Secrets Act 1972 ('OSA'). No one can disclose these even in court. So, any amendment of such documents will have no leg to stand on. On the other hand, if these documents do not fall under the OSA, then what is so secret about them that they could not be produced in court. In any case, the defendant's own contradictiory affidavit in support of this application shows a total lack of merit and *bona fide* in this application.

[Applications dismissed]

Case(s) referred to:

Ex parte Pinochet (No 2) [1999] 1 All ER 577 ***(refd)***
Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin [1995] 2 CLJ 900 ***(refd)***
Maleb Su v. PP [1984] 1 CLJ 378 ***(refd)***
MBf Capital Bhd & Anor v. Tommy Thomas & Anor [1998] 4 CLJ 906 ***(refd)***
Regina v. Gough [1993] AC 646 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 rr. 1, 2(1), (2), O. 20 r. 5, O. 25, O. 41 r. 1(4)

For the plaintiffs - Dato' VK Lingam (Dato' V Sivaparanjothi, R Thayalan, Ashokvijay J Sanghrajka & Ramesh NP Chandran with him); M/s V Siva & Partners
For the defendant - Cecil Abraham (Mohd Shafee Abdullah, WW Cheong, Gurmit Kaur Sidhu & K Shubhaa with him); M/s Shafee & Co

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

The plaintiffs sued the defendant as the Malaysian correspondent of the Asian Wall Street Journal. The plaintiffs contended that between September and November 1995 the defendant spoke and thereby published to one David Samuels, a staff writer of the International Commercial Litigation Magazine and/or other representatives of the magazine (the magazine) of and concerning the plaintiffs, and of and concerning them in the way of their said business and in relation to their conduct therein, certain defamatory words. In answer to questions from the said representatives and in particular to a case in which one Dato' V.K. Lingam represented the plaintiffs against Ayer Molek Rubber Company Berhad, the defendant is alleged to have said:

> The ultimate fear about Ayer Molek and all of these cases is that they mean Malaysia is going the way of other Asian countries such as Indonesia, Thailand and the Philippines. The implication is that, just like those other countries, Malaysia is becoming a place where justice is now 'up for bid'.

Besides contending that the said words spoken by the defendant were calculated to disparage the plaintiffs in their business and to cause them pecuniary damage, the plaintiffs further attributed to the defendant words spoken regarding alleged widespread abuse of judicial procedures and/or about the alleged corruption of the judiciary in Malaysia by the said Dato' V.K. Lingam for and in connivance with his clients, including the plaintiffs.

In the course of getting to hear this case I had to decide on numerous applications. The defendant has appealed against four of my decisions. Rather than writing separate judgments on each of them I have decided to incorporate all four appeals in this one judgment.

(I) Application That Judge Disqualify Himself

I had taken the case through various stages of case management and on 13 August 1999 when I was on the last stage of case management and having fixed the trial dates of this case to 1 September 1999 and from 6 – 10 September 1999, Mr. Cecil Abraham, counsel for the defendant address the court as follows:

(1) Your Lordship heard the case against *Skrine & Co* S2-23-52-92 together with four other related suits where, in respect of a settlement this court heard and recorded a statement made in open Court.

(2) Your Lordship heard the *MBf Capital Berhad* case (same case) reported [1999] 1 AMR 141 (in particular) the contempt against Tommy Thomas and your Lordship made reference to the judgment which this court delivered in S2-23-52-92.

(3) Your Lordship is presently hearing the suit against *Insas Berhad v. The Publishers ie*, S2-23-47-96 and awaiting written submissions. (the *Euromony* suit)

Mr. Abraham was of the view that matters under (1) and (2) concerned the article published in the said magazine. In the light of this he urged me to consider requesting another judge to hear this case. Mr. Abraham also said that there is a quotation of the defendant attributed to the article contained in the said magazine. In respect of matters under (3) it was pointed out that I would have to consider all the statements made, including the statement made by Raphael Pura, the defendant in this case. He pointed out that the main defence of this defendant is that he did not make it, and secondly if he did make it, he was justified in making it.

As against this Dato' Siva, for the plaintiffs, in raising his objections to this oral request that I disqualify myself pointed out that in respect of item (1) I did not hear the case at all on its merits and that the matter was settled with an apology tendered by the defendant after reading out a statement in open court. With regard to item (2) it was pointed out that the case against Tommy Thomas was solely on a contempt committed by him and had nothing to do with the defamation suit although the contempt was committed by him arising out of the settlement of the suit for defamation (see *MBf Capital Berhad & Anor v. Tommy Thomas & Anor* [1999] 1 MLJ 139; [1998] 4 CLJ 906; [1999] 1 AMR 141). In respect of item (3) it was pointed out to me that the publishers were not even defending the suit let alone attending court. Notwithstanding that I had at the request of Encik Shafee, counsel for this defendant, allowed him the opportunity to hold a watching brief in that case against the publishers.

It must be noted that prior to this date when Mr. Abraham requested that I disqualify myself, I had already held three previous case managements and on none of these occasions did the defendant raise this issue of my disqualification.

Mr. Abraham pointed out that on 21 October 1998 when I was informed that all parties involved in item (1) had settled the matter and after a statement was read out in Open Court, I had made the following statement:

> With the consent of all counsel and upon their application to the Chief Judge Malaya, that all other actions in the other courts be transferred to this court for disposal and upon the directive of the Chief Judge Malaya, accordingly, I am happy to record the settlement in respect of all these actions now before me.
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> I thank all counsel and all parties to all these actions for resolving these matters. In respect of the one matter fixed for hearing before me, namely S2-23-52-96, I had case managed the suit and we all can confirm that from the time this case first came up before me, to date, is only 16 months. Notwithstanding the fact that there were numerous interlocutory applications taken together with the case management, I must put on record my appreciation for the cooperation I had received from all counsel.
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> I must admit that it was not easy. But the commitment to their cause and the sincere desire shown by each counsel to assist me, made the task of this court very much lighter.
>
> Each month took this case through the respective case managements. By the time this case finally came up for hearing today, I had heard, disposed off and given written judgments in respect of 11 interlocutory matters, all of which were taken together on appeal and disposed off by the Court of Appeal with one written judgment given by Gopal Sri Ram JCA in respect of all these appeals (see *Skrine & Co v. MBf Capital Berhad & Anor* [1998] 4 AMR 3298).
>
> I do not intend to narrate the facts of this case. In normal circumstances, when a case fixed for hearing is settled the judge makes no comments save to record the settlement and to thank counsel. But I cannot let this case pass me by with a mere recording of the terms of settlement. It is pertinent for me to express my views upon matters leading to this case.
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> It is now clear that the open court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words, notwithstanding the magnanimous gesture of repentance by the defendants.

> Falsehood continuously repeated takes on the mantle of truth. Allegations of improper conduct by the plaintiffs and their counsel in complicity with judges were the basis for these suits to have been commenced. The unreserved apology tendered herein completely vindicates the plaintiffs and their counsel and needless to say reinforces the belief that the scales of justice in this country are ever evenly balanced.
>
> It is my fervent hope that with the closure of all these cases and the amicable settlement arrived at by all parties, everyone, will see the futility of 'shooting from the hip.' With this settlement effected I trust that all parties will now join hands in forgiveness, for who is man to harbour and nurture anger when God Himself forgives.

In any case in respect of the defendant's request that I disqualify myself, I had adjourned the matter and requested for further submissions from counsel. Both counsel then forwarded to me their respective written submissions.

Pre-Judgment On Issues To Be Raised

It is the submission of the defendant that where parties appear to record settlement, there is no reason for the presiding judge to render any statements or judgments. Mr Abraham referred to "the rule of general practice which requires judges to refrain from making any statements when recording settlement". If there indeed is such a general practice then it is unfortunate that Mr. Abraham has failed to refer me to a single case authority or to a rule of such practice. I would have thought that if this rule of practice was the linchpin of the defendant's application to require my disqualification it was the bounden duty of counsel to cite any relevant authority on this score rather than making a bald unsupported statement.

In any case, even assuming there is such a rule of practice known to the defendant, there is nothing wrong in the statement I made. A perusal of the statement shows that it was made purely upon the unreserved apology tendered by the defendant in all the consolidated suits. Without the apology there would have been no basis for making that statement. In this case before me the defendant denies making such a statement. He then argues on the old rolled-up plea that if he did speak such words then he was justified in saying so. Clearly evidence leading to justification would have to be led. If such evidence is cogent and tenable no court can disregard such evidence. It is totally improper at the slightest pretext to seek the disqualification of a judge on the basis that a right-thinking member of the public would have cause to entertain a "reasonable suspicion or belief that there was 'a real likelihood' that a fair trial of the present action" before me was not possible. The attempt by the defendant to confuse the issues must be put right. In the circumstances, it is my considered judgment that no right-thinking member of the public sitting

in my court and appraised of the facts as now narrated by me would hold that I would be prejudiced or that there is even a likelihood of prejudice, against the defendant.

Notwithstanding what I have said so far on the issue of pre-judgment, at no point of time did I ever decide or make a pre-judgment that the words attributed to the defendant herein were in fact defamatory of the plaintiffs. The defamatory words attributed to the defendant herein were never in issue in the earlier suits or in the committal proceedings against Tommy Thomas. And in so far as the *Euromoney* suit (or the suit against the publishers) is concerned I have not even given my judgment and the defendant in this case did not even elect to give evidence, let alone any of the defendants in that suit. I have to add that I had not so far made any finding that Raphael Pura, the defendant herein, did in fact speak to the writer of the said article, Samuels. This clearly is an issue which I have to determine based on evidence adduced at the trial.

The Contempt Proceedings Against Tommy Thomas

It is the defendant's case that in my judgment in respect of the contempt proceedings against Tommy Thomas I had said as follows:

> The article considered in damaging terms various decisions of the Malaysian Courts in respect of certain named cases. The gravamen of the complaint about the article in the suits by the plaintiffs was that the said article accused the lawyers acting for the plaintiffs in the named suits of complicity in; or at least connivance at improperly seeking to obtain favours from the judges concerned in the litigation in which they were involved.

Mr. Abraham referred to my statement made after the terms were recorded, which I referred to as "my judgment" in the contempt proceedings. Mr. Abraham states as follows:

> It is humbly submitted that if there was any doubt as to the 'status' of the statements made by Your Lordship on the 21.10.98, these doubts were effectively erased by the above wherein Your Lordship amply clarified that the statements made from the bench on the 21.10.98 in fact formed a 'judgment'.

The shallowness of this argument can only be measured by the depth of thought given to it. There was no trial, no witness testified, no submissions made and no authorities tendered to be considered. I was merely informed that the parties had come to terms. Even the terms were kept confidential from the court. How then can Mr. Abraham argue that my statement is a judgment even though I had inadvertently used the word judgment is beyond comprehension. The word judgment is not even printed at the commencement of the statement. It is a rule of practice found in every judgment that the word

"Judgment" is prefaced to the contents of the judgment, in the typed copy or the judgment although the word "Judgment" is omitted when the said judgment is reported. In any case during the contempt proceedings against Tommy Thomas no reference was made to any of the issues now taken to disqualify me.

The defendant relies on certain parts of my statement read out in open court after the terms were recorded, to show pre-judgment. The defendant quotes in particular the following passage:

> It is now clear that the open court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words, notwithstanding the magnanimous gesture of repentance by the defendants.

This statement is nothing more than a statement of fact that no litigant or his counsel can buy justice in this country. In any case this statement, whilst a truism cannot amount to a pre-judgment of issues or facts, as my statement was in accordance with the contents of the statement in open court, read out by the defendant's counsel. The statement read out by counsel amply demonstrated that the allegations on the said article were unfounded and made without any basis. Therefore the passage from my statement relied on by the defendant, cannot in any way be taken as amounting to a pre-judgment of issues or facts.

The next paragraph of my statement, the defendant has taken umbrage at is as follows:

> Falsehood continuously repeated takes on the mantle of truth. Allegations of improper conduct by the plaintiffs and their counsel in complicity with judges were the basis for these suits to have been commenced. The unreserved apology tendered herein completely vindicates the plaintiffs and their counsel and needless to say reinforces the belief that the scales of justice in this country are ever evenly balanced.

Again, it is clear that I based this passage on the statement in open court. I had merely held that the unreserved apology in the statement in open court completely vindicated the plaintiffs' reputation and that of their counsel and that it reinforced the belief that the scales of justice are ever evenly balanced. This passage is in reference to the statement in open court and not a finding of fact or a pre-judgment on my part as alleged by the defendant. I am therefore satisfied that a reasonable and fair-minded person sitting in my court and knowing all the relevant facts including the contents of the "Statement in Open court" would have no basis to suspect that a fair trial would not be possible.

The Euromoney Suit

The third issue taken by the defendant was that I am presently hearing the suit (S2-23-47-96) between Insas Bhd and the publishers (the *Euromoney* suit). It must be borne in mind that in this case whilst the publishers had been duly served in the United Kingdom they chose not to defend themselves. The plaintiffs however opted to adduce evidence. The defendant herein, Raphael Pura, sought leave through his counsel, Encik Shafee Abdullah, and held a watching brief throughout the trial. If he felt his rights would be affected he ought to have sought intervention in the *Euromoney* suit instead of merely holding a watching brief. In any case even if it is the defendant's argument that I could be biased in the eyes of a member of the public sitting in court, it is obvious that no bias or possible bias can ever be levied against this court because I have not as yet given my decision since the plaintiff has not even tendered its written submission. I had in the circumstances, and considering the fact that I am now hearing the case against this defendant, and in all fairness to him, even deferred continuing with the *Eurgmoney* suit until I hear this suit.

I cannot move on to the next issue without touching on the additional submissions made by the defendant. I was referred to the House of Lords decision of *Ex parte Pinochet (No. 2)* [1999] 1 All ER 577. In that case Lord Hoffmann was condemned by his brethren for not taking the initiative and recusing himself from hearing in the House of Lords the matter relating to Pinochet. It was pointed out that Lord Hoffmann happened to have an indirect association with one of the interveners appearing before him, that is, Amnesty International (AI). This, the House of Lords held, was sufficient to provide a suspicion, however wrong in fact it might be that he might be pre-disposed to favour the view presented and argued by Amnesty International. Lord Browne-Wilkinson said at p. 586:

> As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say it is alleged that there is an appearance of bias not actual bias.
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> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his

> conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.
>
> In my judgment, this case falls within the first category of case, *viz* where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet Judges on Trial* [1976] p. 303 and *De Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th edn, 1995) p. 525. I will call this 'automatic disqualification'.

I do not understand in what way this case could assist the defendant. Firstly, unlike the *Pinochet* case where Lord Hoffmann's indirect link to AI was attributed to his wife, Lady Hoffmann, working at AI's international secretariat since 1977, there is no direct or indirect link between me and the defendant herein or any of the plaintiffs or any of the defendants in all the suits. Secondly, unlike the *Pinochet* case where Lord Hoffmann himself was a Director and Chairperson of Amnesty International Charity Limited at the time he heard the case, there is no link or connection between me and any of the parties in any of the suits: Therefore, the defendant has failed the first test applied by Lord Browne-Wilkinson on the issue of whether there is an appearance of bias.

The second test relates to a case where a judge is not a party to the suit but that his conduct or behaviour may give rise to a suspicion of impartiality and the example quoted by Lord Wilkinson relates to the friendship of the judge to one of the parties. In this case, as I said I do not know any of the parties, but even so there can be absolutely no fear of bias because I have even deferred proceeding with the *Euromoney* suit.

No Affidavit Evidence

I note that the defendant had made no formal application to disqualify me on the grounds of pre-judgment of issues or facts. There is no affidavit evidence by the defendant or his counsel to sustain such an allegation. Whatever has been said about any "reasonable suspicion" or a "likelihood of bias" are submissions of counsel without any basis.

It must be noted that to allege against a court, possible bias is a serious allegation. Such an attempt must show the seriousness of its intention and this can only be done by the defendant affirming under oath his belief and the need to therefore take such a stand. Whilst I appreciate that lawyers are there to put their client's case before the court, allegation of possible bias must have a solid basis to reflect such a view and that whilst there is no rule of law to prevent a party from orally requesting the judge to disqualify himself the judge ought to, equally give little weight to such an oral application, unsupported by a sworn affidavit.

Tommy Thomas As A Witness

The defendant further argued that he intends to call Tommy Thomas as his witness. The defendant then quoted in extensio, passages from my judgment when I found Tommy Thomas guilty of contempt. The defendant therefore argued that there was a real likelihood of bias on my part against the said Tommy Thomas and that any testimony the said Tommy Thomas would give on behalf of the defendant will not be received by me with an open mind. In my view such an argument is devoid of merit. My finding that Tommy Thomas had not been open and candid with the court was based on the fact that even when the court questioned him his purpose for having made such a press statement after admitting in court he was sorry, he did not in my view tell the truth. The contempt proceedings related to his publishing a statement to the press that the settlement was affected despite his express objections, when in court he was contrite and had apologised. Since his explanation was unacceptable he was found guilty. Just because he was found guilty of contempt cannot, by any stretch of the imagination, render Tommy Thomas's evidence in this case unacceptable. The truth of what Tommy Thomas will say in evidence will be tested by cross-examination. Evidence will be given and recorded in open court, and the court will only decide with an open mind, based on the evidence given. If the defendant's argument is to be accepted then it would mean that Tommy Thomas ought not to even appear before me for fear of bias.

Too Frequent Applications To Disqualify A Judge

It seems that there is now developing a very unhealthy trend to seek to disqualify a judge at the slightest pretext. Often it seems, when a party has fired all its powder and shot which a perceiving judge finds as nothing more than slings and arrows, the next line of attack seems to be an attempt to allege bias or a real suspicion of bias or a real likelihood of bias, against the judge.

It is meet and proper that I cite a passage from the decision of Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin* [1995] 2 MLJ 213 on this question of attempting to harp upon a comment made by a judge and then to try to disqualify him. This is what his Lordship said at p. 220:

> It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage. And any comments that he may make upon the nature and quality of the evidence or pleadings presented to him at that stage do not and cannot be said to infect his mind with bias. In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

Whilst I agree that Gopal Sri Ram JCA made that comment in respect of a comment made by a judge at an interlocutory stage and that his Lordship had also held that the same judge may, after expressing a view in the course of an interlocutory proceeding, quite properly after hearing the main action, come to the opposite conclusion, it is my view that the same principle ought to apply to the comment made by me based on the "Statement in Open Court" and which comment therefore cannot in any way amount to a pre-judgment of issues or facts or showing bias, or a real likelihood of bias or a real suspicion of bias.

I shall not conclude as suggested by the plaintiffs that the defendant had ingeniously avoided a formal application to disqualify the judge and thus having to affirm an affidavit in support, for fear of being punished for contempt as suggested by his Lordship in the *Hock Hua Bank* case. Although no reason was given why an oral application was made through counsel I shall not speculate, in fairness to the defendant.

When Does The Rule Of "Bias" Apply?

No doubt the various law journals abound with authorities which deal with "bias" or a "likelihood of bias" or a "reasonable suspicion of bias". As for me, I prefer to adopt the view expressed by Lord Goff of Chieveley in the House of Lords in the case of *Regina v. Gough* [1993] AC 646. His Lordship said at p. 670 as follows:

> In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn

> in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of **real danger rather than real likelihood,** to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant. (emphasis provided)

In my view there must be a real danger, not a real likelihood of danger of bias. Having considered all the circumstances it is my judgment that there is certainly no real danger of bias in this case. Lord Goff was quick to agree that whilst the earlier view in cases concerning allegations of bias on the part of an arbitrator was whether the circumstances were such that a reasonable man would think that there was a **real likelihood of bias** (emphasis provided) "such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression 'real likelihood' is understood in the sense I have described, *ie*, as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias".

I think this is probably the view that must have been contained in the words of Hashim Yeop A Sani FJ in *Maleb bin Su v. PP* [1984] 1 MLJ 311 at 312, 323 wherein his Lordship said:

> I think the correct view is ... that if bias is alleged (other than pecuniary or proprietary bias) then there must be **proved** a real likelihood of bias and that reasonable suspicion of bias is insufficient. (emphasis provided)

A *fortiori*, I would take the requirement to prove a real likelihood of bias as a step even stronger than the existence of real danger. It is therefore necessary to hold that in the interest of justice unless there is a real danger of bias these frivolous and innumerable applications we see nowadays to disqualify judges must be dismissed more so like in this case when the summons for directions was heard on 8 October 1997 and with numerous case managements fixed in between, the defendant had never thought it fit to raise this issue of bias all

along and only did so when the case had been fixed for hearing. Therefore on 30 August 1999 I dismissed the said oral application to disqualify me from hearing this case. Although my notes show that I had not included costs, that was clearly an oversight. I therefore confirm that the oral application was indeed dismissed with costs.

(II) & (III) Encls 31A And 40

On 1 September 1999 I was set to hear three enclosures. Enclosure 23 was an application by the defendant filed only on 14 August 1999 to amend his defence. At the very outset Mr. Abraham, lead counsel for the defendant, wished to withdraw encl. 23 on the basis that it was filed by the solicitors without any supporting affidavit. Whilst the plaintiffs did not have any objections to the said withdrawal they however insisted on costs and with the defendant conceding to costs, I struck out encl. 23 with costs to be agreed or taxed.

The defendant then proceeded with encl. 31A. This was identical to encl. 23 except that this time the defendant had not forgotten to file an affidavit in support. However, even before he could commence his submission, Mr. Abraham pointed out that encl. 31A itself contained errors in that, (a) the summons in chambers made reference to O. 25 of the Rules of the High Court 1980 (the RHC) rather than O. 20 r. 5, and (b) the amendments had been referred to as being in green rather than in red. Because of these errors he had filed encl. 40 which was an application to amend encl. 31A to rectify the two errors. It was therefore necessary for me to hear encl. 40 first.

Dato' V.K. Lingam for the plaintiffs then pointed out to me that the defendant had again fallen into the same error as he did in respect of encl. 23, by again failing to file an affidavit in support of encl. 40, and therefore asked that the said application be dismissed with costs. Mr. Abraham contended that since the two amendments sought were merely procedural in nature, there was no prejudice occasioned to the plaintiffs.

Since I had already given my oral decision on that very day, I shall, merely record the same from the notes lest it be said that this court had supplemented its earlier judgment by giving fresh reasons. This is what I said:

> Enclosure 40 is clearly defective as it is unsupported by an affidavit. Once a party elects to take a course of action when two such courses are open to him and if the course taken by him is defective he cannot switch mid-stream and fall back on the other course.
>
> Enclosure 40 dismissed with costs.

Mr. Abraham at this stage then made an oral application to amend encl. 31A. This was objected to by the plaintiffs. All I wish to add is that, since the defendant had chosen to put in a written application to amend he cannot once he finds that defective, rely on any oral application. The least the defendant could have done was, since he had already withdrawn encl. 23 for the same reason, to withdraw encl. 40 and then apply for an oral amendment.

I had also refused a stay of proceedings as the trial had been fixed for the following Monday.

(IV) Enclosure 43, The 3rd Application To Amend The Defence

On 8 September 1999 when I was about to continue with the trial Encik Shafee informed me that he wished encl. 43 to be heard first which was his application to amend the defence. It must be noted that this was the third attempt by the defendant to amend the defence during the trial. However, since the plaintiffs had served an affidavit on him just that day he wanted an adjournment to the next day to put in a short reply. Counsel for the plaintiffs objected to the request for an adjournment and pointed out that whilst the defendant's affidavit in support of the third application to amend was affirmed on 2 September 1999 at 9am, he was only served with the said affidavit and application on 3 September 1999 at 4.05pm and he questioned why he was served a day late and at almost at the end of the day. He pointed out that his reply affidavit related to non-compliance of the RHC and that therefore there was no need for a reply as counsel could address the court on the law. I then stood down the matter for an hour to allow Encik Shafee to read the short affidavit and to reply thereto orally by way of submission since procedural objections were being taken. However, I indicated that if the defendant wished, I would allow him the opportunity to adduce oral evidence to rebut the plaintiffs' affidavit in reply. This offer was not taken and Ms. Gurmit Kaur for the defendant submitted that since the objections taken by the plaintiffs were merely procedural or technical the plaintiffs ought to have filed an application and she referred me to O. 2 r. 2(1) and (2) of the RHC.

The said rules read as follows:

> 2 Application to set aside for irregularity
>
> (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.

She argued that based on sub-r. (2) the grounds of objections must be stated in the summons or notice of motion and that therefore the procedure for setting aside on grounds off irregularity is precise. It was her contention that since there was no application in conformity with Form 62 of the RHC any objections taken ought to be dismissed.

In reply, Dato' V.K. Lingam submitted that O. 2 r. 1 relates to an application to set aside for irregularity of any proceedings. In so far as the plaintiffs were concerned they were not applying to set aside the proceedings. They in fact were desirous of going on. I made a short ruling on this issue. I have transcribed verbatim herein my said ruling from the notes of evidence and it reads as follows:

> Court:
>
> Both counsel have missed the point. If an application is made to set aside any proceedings, a document or judgment or order for irregularity then the provisions of O. 2 r. 2 applies.
>
> Here there is clearly no application before me. The plaintiff has merely responded to the defendant's affidavit. Surely by no stretch of the imagination can this be construed as an application to set aside. The plaintiff or for that matter the defendant is entitled, no, duty bound to point out irregularities.
>
> A party can either choose to file a formal application to set aside proceedings or a document or an order or a judgment, or a party can raise the irregularity in the affidavit in response.
>
> The plaintiff herein has chosen the latter course of action. Clearly therefore in my view O. 2 r. 2 of the RHC does not apply.

After my ruling counsel for the plaintiffs pointed out various non-compliance on the part of the defendant in respect of his affidavit in support of his third application to amend. They were as follows:

(1) The defendant's affidavit served on the plaintiffs did not have the signature of the Commissioner for Oaths. It only contained a chop with the printed words Ralph Kinny Fernandez.

(The court was shown the copy which indeed did not contain the signature.)

(2) The Jurat too did not contain the signature of the Commissioner for Oaths.

(3) The Jurat was on a separate page when it should actually start on the page where the defendant had actually signed.

(4) Paragraphs not numbered.

Supporting his arguments with authorities counsel for the plaintiffs contended that if the defendant had lied in his affidavit the plaintiffs would be deprived of their right to pursue an action for perjury due to the non-compliance. In reply the defendant whilst challenging each issue, argued that the court had the discretion under O. 41 r. 1(4) of the RHC to allow for the use of any defective affidavit.

I then adjourned the matter and shortly thereafter proceeded to give my *ex tempore* decision on the application to amend. I shall transcribe the said decision verbatim as I pronounced in open court, from the notes of evidence. My decision was as follows:

> To my mind the Rules of the High Court 1980 is like the beacon of a lighthouse guiding the litigant through the treacherous waters of pleadings into lanes of safety to enable him to reach the port called "victory".
>
> To the defendant the same rules must be like the spotlight of a watch tower, ever watchful to see if the plaintiffs' attempts to break through or breach the perimeters that govern and control litigation. Sometimes the roles are reversed like in this case.
>
> The defendant has attempted to amend the pleadings:
>
> (a) at this late stage;
>
> (b) in breach of the rules that govern his application to amend.

Breach Of Rules

Although it was submitted to me that the defendant had breached various rules yet in the overall interest of justice I even allowed the defendant to address me on the merits. I directed the defendant to address me on five issues, namely:

(1) Delay in filing this application.

(2) If documents kept overseas is not this caught by O.S.A.?

(3) Admission by defendant that no fresh evidence is being adduced.

(4) If already raised in previous suit why could you not have raised these earlier?

(5) No exhibits to back up the affidavit.

Instead of answering me Encik Shafee wished to tender his written submission. I reject that as all I wanted was a response to the court's five issues.

To a question by the court whether the defendant had attached any exhibits to his affidavit to back up his allegations, Encik Shafee's response was there are no exhibits attached because there is no necessity. With that I refused to hear him further and indicated there was no need for a response from the plaintiff.

To my mind the defendant has failed to show a basis to seek the amendment. Whilst affirming an affidavit he has totally failed to exhibit any documents that support his prayer for amendment. Without the exhibits how is the court to know the basis of the defendant's allegations. In his affidavit in para 2 the defendant has admitted having "records" to which he has access on which the affidavit was based. Where are those records? What are those records? Encik Shafee Abdullah is one of the most experienced counsel we have. Surely it is unthinkable that he would have omitted by inadvertence to include them. I hold the omission as deliberate because there are no such records or original records. If there were they would have been produced. Therefore the alleged amendments are left in suspended animation and like a deflated balloon it must come down finally today after three abortive attempts.

Merits

Defendant says he had to keep some of the documents overseas for safe keeping. This now seems to become a new trend – to contend that documents ought to be kept overseas for safe keeping. Such a suggestion itself tarnishes the image of this beautiful country. It suggests that nothing is safe, when such is totally false and a mischievous suggestion at that to make.

Assuming this is true, *ie*, that some documents were kept overseas, what were they. This court must be shown the documents and they must be identified to satisfy the court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led. Mr. Raphael Pura's allegation that it is not safe to keep documents in this country is a very serious accusation that must be met with the clearest evidence from him. Otherwise it could lead to a suggestion of *mala fide* on the part of the defendant.

Now assuming the documents were top secret material that had to be secreted overseas for safe-keeping then clearly on the defendant's own admission such documents fall under the Official Secrets Act. No one can disclose these even in court. So therefore any amendment sought that requires the admission of such documents will have no leg to stand on in any case.

On the other hand, if the said documents do not fall under the OSA then what is so secret about these documents that they could not be produced much earlier during the case management stage. In any case if the defendant feared for the safety of the original documents, all that is needed during the case management is to only tender photostat copies of such documents. The defendant could have given an undertaking to the court to produce the originals at the trial. If there is a will, there is always a way.

In any case the defendant's own contradictory affidavit in support of this application shows the total lack of merit in this application. The defendant has admitted that what is sought to be admitted is not fresh evidence and that they have been raised in an earlier suit. Whilst the defendant has not identified the suit, I am satisfied that the defendant is satisfied that the amendments sought have been already raised in another suit. If that be the case then the defendant's earlier averment that he could not amend earlier because he had to interview the witness and compare documents and secrete the documents for safekeeping overseas are all untrue. There is total lack of merit in this application which lacks *bona fide*.

Application dismissed with costs.